NO. 96-1655

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In the Supreme Court of the United States

OCTOBER TERM, 1996

DAVID L. SMITH, as assignee of the interest of original Plaintiff, C. H. FAULKENBERRY, JR.,
Petitioners,

vs.

JOHN ELKINS, BENEFITS SYSTEMS, INC., MICROBE MASTERS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENT, MICROBE MASTERS, INC.

and

BRIEF OF AMICUS CURIAE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENT, MICROBE MASTERS, INC.

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENT, MICROBE MASTERS, INC.

I. Motion

International Biochemicals Group, Inc., ("IBG") moves this Court to file an *amicus curiae* brief supporting Microbe Masters, Inc., ("MMI") and opposing the petition for writ of certiorari filed by David L. Smith ("Smith").

Smith attempted to revive by motion a federal consent judgment that was assigned to him by the wife of the deceased plaintiff in the original matter of *C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc. and Microbe Masters, Inc.*, Civil Action No. 85-146-B-1, United States District Court of the Middle District of Louisiana ("Original Action"). The District Court denied Smith"s motion to revive and the Fifth Circuit Court of Appeals affirmed.

IBG is the corporate successor to MMI, the original defendant. IBG was not permitted to file an opposition in the Fifth Circuit, because IBG was never made a defendant to the Original Action. However, the Fifth Circuit granted leave for IBG to file an *amicus curiae* brief. This Court should grant IBG's motion for the same reasons the Fifth Circuit allowed IBG to participate as *amicus curiae*. IBG is the only person that can inform the Court of the relevant law and facts in opposition to Smith's petition.

Pursuant to Rule 37.2 of the United States Supreme Court, counsel for IBG requested consent from Smith, petitioner, and John W. Elkins ("Elkins"), defendant in the original action, to file an amicus curiae opposition to Smith's petition for writ of certiorari. IBG could not obtain consent from the original defendants, Faulkenberry, Benefits Systems, Inc., and MMI, because Faulkenberry is deceased

and the two corporations are dissolved. Elkins consented in writing to IBG's request. Smith, to date, has refused IBG's request for consent.

Smith's refusal to consent forces IBG to file this motion for leave to ensure that the Court is fully briefed on the law and facts in this appeal.

II. Statement of Interest.

IBG is the corporate successor to MMI, named as a defendant in the Original Action. Smith, as assignee, is attempting to revive and enforce a consent judgment that was entered in January of 1983 in the Original Action. Smith, as assignee, moved the district court to substitute himself as party plaintiff for the purpose of reviving the consent judgment on November 21, 1995. On the same day, Smith moved the district court to revive the consent judgment. On November 27, 1995, prior to the expiration of the delays for responding to the motions, the district court denied both motions.

On December 14, 1995, Smith moved the district court again to substitute himself as party plaintiff and to order MMI and IBG to appear and show cause why a writ of execution/*fieri facias* should not issue against IBG. On December 19, 1995, prior to the expiration of the delays for responding to this motion, the district court denied the requested relief.

Smith then appealed the district court's decision to the United States Fifth Circuit Court of Appeals. The Fifth Circuit affirmed, holding that Smith could only revive the judgment in an "ordinary proceeding" and not by motion. Importantly, while the appeal was pending Smith filed a complaint to revive the federal judgment in an ordinary proceeding in the matter of *David L. Smith v. International Biochemicals Group, Inc.*, Civil Action No. 95-2041-A-1, United States District Court of the Middle District of Louisiana ("Revival Action"). The complaint was filed within the prescriptive period applicable for judgments under Louisiana

law and in effect cured by the procedural deficienty. The district court then consolidated the Original Action and Smith's Revival Action.

IBG answered Smith's complaint and the Revival Action is not being litigated in the district court. IBG assserts in its answer that the consent judgment is not enforceable against IBG, because MMI was never served with the original complaint making the judgment a nullity as to MMI and, alternatively, the original consent judgment was satisfied as to MMI by a partial cancellation that was executed by the plaintiffs in favor of MMI.

Although the facts surrounding the dispute in the Revival Action are not part of the record of the appeal before the Fifth Circuit, IBG is duty bound to disclose them to the Court, because they raise questions of whether this Court has jurisdiction to hear this appeal. See, *Arizona for Official English v. Arizona*, ____ U.S. ____, 117 S.Ct. 1055, at 1069, n. 23, 137 L.Ed.2d 170, at 194, n. 23 (1997).[1] Further, the fact that Smith did not disclose them to the Court highlights the need for IBG to file an *amicus curiae* opposition. IBG's participation in the proceedings is needed to fully inform the Court of all facts and law that are relevant to its review of Smith's petition for writ of certiorari.

III. Argument and Law

Rule 37 of the Supreme Court suggests that an amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help. IBG is the only person that can inform the Court of relevant law and facts in opposition to Smith's petition, because the three original defendants to the district court proceeding did not file any opposition. Further, since Smith is also attempting to revive and enforce the judgment against IBG, it is necessary for IBG to apprise

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[1] IBG has also filed a motion to suggest mootness in accordance with United States Supreme Court Rule 21.1(b).

this Court of its interest by presenting the resons why Smith's petition fails to satisfy any consideration for granting writs.

The most compelling reason for granting the requested leave to appeal *amicus curiae* is that there will be no party supporting the decision under review in absence of IBG. The District Court for the Middle District of Pennsylvania addressed a similar situation in which no other party or nonparty supported the decision under review. The court determined that when an appeal is taken from a district court order and no party to the appeal supports the decision under review, an appellate court may appoint an attorney as *amicus curiae* to defend the district court's decision, the purpose being to give the appellant court the benefit of an adversarial presentation of the issue. *Pennsylvania Environmental Defense Foundation v. Bellefonte Borough.* 718 F.Supp. 431, 434 (M.D.Pa. 1989). For the same reasons cited in the *Pennsylvania* decision, the Court should permit the appearance of IBG as *amicus curiae* to defend the decision of the district court in these proceedings. Participation of amicus curiae at the appellate level has become standard procedure. *Yip v. Pagano,* 606 F.Supp. 1566, 1568 (D.C.N.J. 1985), *affirmed,* 782 F.2d 1033 (3rd Cir. 1986), *cert. denied,* 476 U.S. 1141, 106 S.Ct. 2248, 90 L.Ed.2d 694 (1986).

Smith will likely assert that IBG should not be allowed to present an *amicus curiae* brief that is partial and that opposses his views. However, there are no strict prerequisites that must be established prior to qualifying for *amicus* status. An individual seeking to appear as *amicus curiae* must merely make a showing that his participation is useful to or otherwise desireable by the Court. *United States v. State of Louisiana,* 751 F.Supp. 608, 620 (E.D.La. 1990). There is no rule that *amici* must be totally be disinterested in the litigation. *Funbus Systems, Inc. v. C.P.U.C.,* 801 F.2d 1120, 1125 (9th Cir. 1986). *Bryant v. Better Business Bureau of Greater Maryland,* 923 F. Supp. 720, 728 (D.Md. 1996). By the nature of things, an *amicus* is not typically impartial.

IV. Conclusion

IBG requests that this Court allow it to appear in support of MMI and to defend the decision under review. This Court should allow IBG to file an *amicus curiae* opposition, because IBG is the only person that can inform the Court of relevant facts and law that are in opposition to Smith's petition.

Respectfully submitted,

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Attorneys for International Biochemicals Group, Inc., Amicus Curiae

QUESTION PRESENTED FOR REVIEW

International Biochemicals Group, Inc., as *amicus curiae,* presents the following question for review.

Whether compelling reasons for review are presented by the decision of the United States Fifth Circuit Court of Appeals that a federal consent judgment cannot be revived by motion in a district court in Louisiana, because Louisiana law requires the revival action to be prosecuted by ordinary proceedings.

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[1] See, Smith Petition for Writ of Certiorari, Appendix A-15 for full text of opinion.

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RELEVANT LOUISIANA LEGISLATION

The following Louisiana Legislation is provided to the Court in addition to those authorities cited in David L. Smith's petition for writ of certiorari.

Louisiana Civil Code Article 3300

A judicial mortgage is created by filing a judgment with the recorder of mortgages.

Louisiana Code of Civil Procedure Article 851

Three different modes of procedure are used in civil matters in the trial courts of this state: ordinary, summary, and executory.

The articles in this Book govern ordinary proceedings, which are to be used in the district courts in all cases, except as otherwise provided by law.

Summary and executory proceedings are regulated by the provisions of Book V.

Louisiana Code of Civil Procedue Article 2591

Summary proceedings are those which are conducted with rapidity, within the delays allowed by the court, and without citation and the observance of all the formalities required in ordinary proceedings.

STATEMENT OF THE CASE

1. Introduction

David L. Smith ("Smith"), petitioner, attempted to revive by motion a federal consent judgment that was assigned to him by the wife of the deceased plaintiff in the original matter of *C. H. Faulkenberry, Jr. v. John Elkins, Benefits System, Inc., and Microbe Masters, Inc.,* Civil Action No. 85-146-B-1, United States District Court of the Middle District of Louisiana ("Original Action"). The District Court denied Smith's motion to revive the judgment and the United States Fifth Circuit Court of Appeals affirmed. International Biochemicals Group, Inc. ("IBG"), as *amicus curiae* in support of original defendant Microbe Masters, Inc., opposes Smith's petition for writ of certiorari.

II. Course of Proceedings Below and Relevant Facts

Smith moved the district court to substitute himself as party plaintiff for the purpose of reviving a consent judgment entered in the Original Action, civil action number 85-146-B-1, in favor of C.H. Faulkenberry, Jr., and against John Elkins, Benefits Systems, Inc. and Microbe Masters, Inc. ("MMI"). (Appendix A. p. A-3). Smith also requested that the District Court revive the consent judgment with a motion to revive (Appendix A. p. A-3). Prior to the expiration of the delays for responding to the motions, the district court denied both motions essentially ruling that the court lacked jurisdiction to hear the matter in the manner the motions were presented by Smith. (Smith Petition for Writ of Certiorari, Appendix, 7a and 8a).[1]

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[1] Hereinafter, "Smith Pet., App."

Smith then moved the district court again to substitute himself as plaintiff and to order MMI and IBG to appear and show cause why a writ of execution/fieri facias should not issue against IBG. (Appendix A,p. A-3). Prior to the expiration of the delays for responding to this motion the district court again denied Smith's motions and in its ruling questioned its jurisdiction to grant the relief in the manner requested by Smith. (Smith Pet. App. 10a).

Smith then appealed the district court's decision to the United States Fifth Circuit Court of Appeals. While the appeal was pending Smith filed a complaint to revive the federal judgment in an ordinary proceeding in the matter of *David L. Smith v. International Biochemicals Group, Inc.,* Civil Action No. 95-2041-A-1, Unitd States District Court of the Middle District of Louisiana ("Revival Action"). (Appendix B, p. A-6). The complaint was filed within the prescriptive period applicable for judgments under Louisiana law and in effect cured Smith's procedural deficiency. The district court then consolidated the Original Action and the Revival Action. (Appendix A, p. A-3).

The consolidated action is now pending before the district court. IBG answered Smith's complaint and asserted that the consent judgment is not enforceable against IBG, because: (1) MMI was never served with the original complaint making the judgment a nullity as to MMI; and (2) alternatively, the original consent judgment was satisfied as to Microbe Masters, Inc. by a partial cancellation, in favor of MMI. (Appendix C. p. A-12 - A-13).[2]

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[2] Although the facts surrounding theRevival Action are not part of the original appellate record before the Fifth Circuit Court of Appeal, counsel of IBG discloses them to the Court in view of the continuing duty to

Notwithstanding the Revival Action, the Fifth Circuit eventually affirmed the district court's ruling, holding that Smith's motion to revive a federal judgment could not be maintained because revival of federal judgments in district courts in Louisiana could only be instituted by an ordinary action as required by Louisiana law. (Smith Pet., App. 1a).

SUMMARY OF ARGUMENT

Under Supreme Court Rule 10 Smith's petition for writ of certiorari should show a compelling reason to review the Fifth Circuit decision. Compelling reasons generally include a decision by a United States court of appeals that decides an important federal question in conflict with decisions of this Court or other United States court of appeals on the same matter. See, U.S.Sup.Ct.Rule 10(a) and (c). This Court has also suggested that it hesitates to review lower federal court's interpretation of state law and will only do so in those limited cases where the decision unreasonably interprets state law. See, e.g., *Propper v. Clark,* 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949) and *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, at 500, 105 S.Ct. 2794, at 2800, 86 L.Ed.2d 394, at 403 (1985). Smith's petition for writ of certiorari fails to demonstrate that the Fifth Circuit decision meets any of these criteria.

The Fifth Circuit decision in this matter ruled that the

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footnote 2 continued

inform the Court of all facts that arise at any stage in the proceedings that could affect the jurisdiction of the Court to even hear the appeal. See, *Arizona for Official English v. Arizona,* ____U.S.____, 117 S.Ct. 1055, at 1069, n. 23, 137 L.Ed.2d 170, at 194, n. 23 (1997). As argued in IBG's Motion to Suggest Mootness, these facts should make Smith's petition moot.

revival of a federal court judgment follows the procedural law of the forum state. The court then concluded that Louisiana law allows an action for revival only by an "ordinary proceeding" and that Smith's attempt to obtain revival of the federal judgment by motion was improper. The Fifth Circuit decision does not offer a compelling question for this Court to review for two simple reasons.

I. The decision to apply Louisiana law is consistent with the Federal Rules of Civil Procedure, federal statutory law, and decisions of this Court and other federal courts. Federal rule of Civil Procure 81(b) abolishes the former method of reviving federal judgments by a writ of scire facias. However, Rule 81(b) also preserves the remedy available under the former writ of scire facias, provided the "appropriate action" or "appropriate motion" prescribed by the Federal Rules of Civil Procedure is followed. Unfortunately none of the procedural rules explain what is "appropriate."

The Fifth Circuit's decision to adopt state law to find the "appropriate" procedure for reviving a federal judgment is consistent with decisions of this Court and other federal decisions. This Court has consistently held that it is generally appropriate to adopt state statutes of limitations and their relevant provisions for tolling and revival in federal question cases; unless the adoption of state law interferes with federal law. See, *Hardin v. Straub,* 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989), *Board of Regents, Etc. v. Tomanio,* 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980), and *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975).

The revival of judgments is the method of interrupting the statute of limitations for judgments. The applicable period

for the statute of limitations for federal judgments is governed by state law under 28 U.S.C. § 1962, unless the judgment is in favor of the United States or state law discriminates against federal judgments. The Fifth Circuit's adoption of Louisiana revival procedure is proper, because there is no confict between Louisiana law and federal law under 28 U.S.C. § 1962. The judgment in question is not in favor of the Unitd States. Louisiana law does not discriminate against federal judgments. Under Louisiana law the prescriptive[3] period for federal and state judgments are the same. La.Civ. Code art. 3501. Additionally, Louisiana Revised Statutes Title 13, Section 4204 permits a judgment rendered by a United States court of original jurisdiction of Louisiana to be filed in the same manner as a state court judgment.

II. This Court should not review the Fifth Circuit's interpretation of Louisiana law, because the decision is a reasonable construction of Louisiana law. The Fifth Circuit held that Louisiana law only allows revival of judgments by "ordinary proceedings" as required under Louisiana Code of Civil Procedure Article 2031. The Fifth Circuit's interpretation is not "unreasonable", because Article 2031 provides for revival only by "ordinary proceedings" and does not mention revival by motion or summary proceedings. Simply put, the "ordinary proceeding" under Article 2031 is the exclusive method in Louisiana by which a judgment can be revived and the prescriptive period for the judgment interrupted. See, *Cassiere v. Cuban Coffee Mills,* 74 So.2d 193 (La. 1954) and *Baham v. Youngstown Sheet and Tube Co.,* 191 So.2d 668, 671 (La. App. 2 Cir. 1966).

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[3] Louisiana law uses the term of prescription to describe what federal and other states' law call statutes of limitation.

ARGUMENT

II. THE FIFTH CIRCUIT DECISION IS CONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE, FEDERAL STATUTORY LAW, AND DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS

The Federal Rule of Civil Procedure 81(b) abolishes the writ of *scire facias*[4], but preserves the relief that was available in the writ, provided that revial is "...obtained by appropriate action or by appropriate motion under the practice prescribed in these rules." Athough Rule 81(b) preserves the remedy of revival formally available, it explicitly requires that revival be obtained by appropriate action or by appropriate motion under the practice prescribed in the Federal Rules of Civil Procedure. Unfortunately, the rules of civil procedure do not specify how to determine the "appropriate" procedure for revival. Federal law has, however, expressly set forth that state law generally governs the procedures for execution of a judgment[5] and for establishing a judicial lien over property in the state where the lien is being perfected.[6] Thus, there is an apparent gap in the Federal Rules of Civil Procedure regarding revival of federal judgments.

The Fifth Circuit's decision to adopt state procedural law for revival of judgments is consistent with the general principle that federal courts use state law to fill in the gaps

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[4] The writ of scire facias includes the remedy of revival of judgments.

[5] Federal Rule of Civil Procedure 69(a), 28 U.S.C.

[6] 28 U.S.C. § 1962.

of federal law. See, *Hardin v. Straub*, 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989); *Board of Regents, Etc. v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980); and *Johnson v. Railway Express Agency, Inc.* 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). In *Johnson, Tomanio,* and *Hardin,* this Court consistently held that it is generally appropriate to adopt state statutes of limitations and their relevant provisions for tolling and revival in federal question cases; unless the adoption of state law interferes with federal law. See, *Hardin v. Straub,* 490 U.S. at 539, 109 S.Ct. at 2000, 104 L.Ed.2d at 588; *Board of Regents, Etc. v. Tomanio,* 446 U.S. at 485, 100 S.Ct. at 1795-1796, 64 L.Ed.2d at 448; and *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 463-465, 95 S.Ct. 1722-1723, 44 L.Ed.2d at 303-304. This Court explains that state statutes of limitations and related lw regarding the implementation of the statutes of limitations should generally be tied together, because:

> In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.

Johnson v. Railway Express Agency, Inc., 421 U.S. at 464, 95 S.Ct. at 1722, 44 L.Ed.2d at 303. Thus, it follows that federal courts "should not unravel state limitation rules [including those rules that are interrelated to the statute of limitations], unless their full application would defeat the goals of the federal statute at issue." *Hardin v. Straub,* 490 U.S.

at 539, 109 S.Ct. at 2000, 104 L.Ed.2d at 588. (*citations omitted*).

These decisions apply with equal force to this case. Just as in *Hardin, Tomanio,* and *Johnson,* state law applies in determining the relevant period of statute of limitation for federal judgments. In fact, Congress expressly requires that state law apply in determining the "manner and time" in which federal judgments cease to be a lien on the property located in the state. 28 U.S.C. § 1962.[7] Under Louisiana law, a money judgment prescribes by the lapse of ten years from the date of rendition. La.Civ.Code art. 3501. Article 3501 allows the prescriptive period to be interrupted and started anew, if an interested person revives the judgment as provided in Louisiana Code of Civil Procedure Article 2031. Article 2031, in turn, requires that the judgment be revived "... by an interested party in an ordinary proceeding...." The prescriptive period of the judgment and the manner in which it is interrupted by revival is properly adopted under the rulings of this Court, unless the adoption of Louisiana law would be inconsistent with a relevant federal statute.

Here, the relevant statute is 28 U.S.C. § 1962, which sets forth the procedures for establishing judicial liens with federal judgments. Under § 1962, state law should not app-

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[7]28 U.S.C. § 1962 states, in pertinent part, "Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time...."

ly in two situations.[8] First, state law should not apply when a judgment is rendered in favor of the United States. Second, state law should not apply when it does not authorize federal judgments to be recorded in the same manner as state court judgments in establishing the judicial mortgage. Here, neither federal interest in § 1962 is violated.

The judgment in this matter is not in favor of the United States. Louisiana law provides that judicial mortgages are established by recording the judgment in the parish (county) where the property of the debtor exists. La. Civ. Code art. 3300. Louisiana Revised Statutes Title 13, Section 4204 permits a judgment rendered by a United States court of original jurisdiction of Louisiana to be filed in the same manner as a state court judgment. Finally, there is no discrimination under Louisiana law between the prescriptive period for federal and state judgments.[9] Thus, application of Louisiana law is proper, because it does not interfere with the federal interests expressed by Congress in 28 U.S.C. § 1962.

In addition to being consistent with decisions of this Court, the Fifth Circuit's decision to adopt Louisiana pro-

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[8] See, 28 U.S.C. § 1962, which states, "... This section does not apply to judgments entered in favor of the United States. Whenever the law of any State requires a judgment of a State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to judgments of the courts of the State."

[9] Under La. Civ. Code art. 3501 the period is ten years for all "trial courts" of Louisiana and does not discriminate between federal court judgments and state court judgments.

cedural law as the "appropriate" method for reviving the judgment under Rule 81(b) is also consistent with other federal court decisions. See, e.g., *United States v. Fiorala*, 869 F.2d 1425, 1426 (11th Cir. 1989)(relying on Alabama law to determine timeliness of a motion seeking revival); *Michael v. Smith*, 221 F.2d 59, 61 (D.C. Cir. 1955)(relying on District of Columbia law, which allows renewal by motion, to determine timeliness of a motion to renew judgment); *Urban Resorts Group v. Wheeler*, No. 82-2470, 1996, WL 28507, at 1 (E.D.La. 1/22/96)(relying on Louisiana law, which requires revival by petition, to determine timeliness of a complaint seeking revival of judgment)[10]; *Powles v. Kandrasiewicz*, 886 F. Supp. 1261, 1263-1264 (W.D.N.C. 1995)(relying on Alabama law, which allows revival by motion to determine timeliness of a motion to revive).

Smith's petition for writ of certiorari fails to make the requisite showing that the questions raised by the Fifth Circuit decision are compelling in nature and involve important federal questions in which there is significant disagreement with decisions of this Court or other federal courts. In fact, the Fifth Circuit decision is consistent with analogous decisions of this Court and other federal courts. Therefore, there is no compelling reason to review the decision of the Fifth Circuit to adopt Louisiana procedures for the "appropriate" method of revival under Rule 81(b).

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[10]The Fifth Circuit decision in this matter relied on *Urban Resorts Group v. Wheeler* in making its decision. For full text of opinion see, Smith Pet. App., A-14.

II. THE FIFTH CIRCUIT'S INTERPRETATION OF LOUISIANA LAW IS NOT UNREASONABLE AND SHOULD NOT BE REVIEWED BY THIS COURT

Generally, this Court has indicated that it is "hesitant to overrule decisions by federal courts skilled in the law in particular states unless their conclusions are shown to be unreasonable." *Propper v. Clark*, 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949). This Court has deferred to the construction of a state statute given by the lower courts in light of the "... belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." See, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, at 500, 105 S.Ct. 2794, at 2800, 86 L.Ed.2d 394, at 403 (1985).

Here, there is no compelling reason to review the Fifth Circuit's interpretation of Louisiana law, because it merely follows the express language of Louisiana legislation. Louisiana Civil Code Article 3501 states that an interested party may revive a judgment "... before it prescribes, as provided in Article 2031 of the Code of Civil Procedure." Louisiana Code of Civil Procedure Article 2031 expressly provides that "[a] money judgment may be received at any time before it prescribes by an interested party in an ordinary proceeding brought in the court in which judgment was rendered."

The use of the phrase "ordinary proceeding" is significant, because under Louisiana law an "ordinary proceeding" is distinguishable from a "summary proceeding." Louisiana Code of Civil Procedure Article 2591 states that "[s]ummary proceedings are those which are conducted with rapidity...and without citation and the observance of all the formalities

required in ordinary proceedings." Further, Louisiana Code of Civil Procedure Article 851 mandates that the procedural rules for "... ordinary proceedings...be used in the district courts hin all cases, except as otherwise provided by law."

Therefore, the use of ordinary proceedings in Article 2031 and the omission of any provisions regarding summary proceedings or proceedings by motion show that the Louisiana's legislature intended that revival actions only be prosecuted by an "ordinary proceeding." Thus, the exclusive method by which the running of prescription on a money judgment may be interrupted is by filing suit to revive a judgment as provided under Louisiana Code of Civil Procedure Article 2031. *Cassiere v. Cuban Coffee Mills,* 74 So.2d 193 (La. 1954)(where the Louisiana Supreme Court was interpreting former Civil Code Article 3547 which had provided for interruption of prescription of a judgment by an ordinary proceeding); and *Baham v. Youngstown Sheet and Tube Co.,* 191 So.2d 668, 671 (La. App. 2 Cir. 1966)(applying Louisiana Code of Civil Procedure Article 2031).

In view of the express language of Articles 851, 2591 and 2031 and the Louisiana Supreme Court's finding that the exclusive method of interrupting prescription is through a revival action by "ordinary proceedings," the Fifth Circuit's interpretation of Louisiana law cannot be viewed as "unreasonable." Therefore, there is no compelling reason for this Court to review the Fifth Circuit's interpretation of Louisiana law.

CONCLUSION

The Fifth Circuit's decision to adopt Louisiana procedural law for reviving judgments is consistent with Federal Rules of Civil Procedure, federal statutory law, and decisions of this Court. The Fifth Circuit's interpretation of Louisiana law is not "unreasonable," because it merely follows the clear and unambiguous language in the Louisiana Code of Civil Procedure that requires that revival of judgments be instituted by an "ordinary proceeding."

Since there is no compelling reason to review the Fifth Circuit decision, Smith's petition for writ of certiorari should be denied.

Respectfully submitted,

J. RODNEY RYAN, JR.
Counsel of Record
JONES, WALKER, WAECHTER, POITEVENT, CARRÈRE & DENÈGRE, L.L.P.

Attorneys for International Biochemicals Group, Inc., Amicus Curiae

APPENDIX A

APPEAL CLOSED
LEAD

U. S. District Court
Middle District of Louisiana (Baton Rouge)
CIVIL DOCKET FOR CASE#: 85-CV-146

Faulkenberry v. Elkins, et al — Filed: 2/19/85
Assigned to: Judge Frank J. Polozola
Demand: $0,000 — Nature of Suit: 890
Lead Docket: None — Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 15:77 Securities Fraud

C H FAULKENBERRY, JR
plaintiff

William P. Brumfield
[COR LD NTC]
Brumfield & Brumfield
P. O. Box 91200
Baton Rouge, LA 70821
22033
504-343-0618

v.

JOHN ELKINS
defendant

Charles K. Watts
[COR LD NTC]
Seale, Smith, Zuber & Barnette
8550 United Plaza Bldg.
Suite 200
Baton Rouge, LA 70809
22033
504-924-1600

Docket as of April 5, 1996 9:23 am

BENEFITS SYSTEMS INC defendant	Charles K. Watts (See above) [COR ld BTC]
MICROBE MASTER INC defendant	Charles K. Watts (See above) [COR LD NTC]

INTERNATIONAL BIOCHEMICAL GROUP consolidated defendant	Alton E. Bayard, III [COR LD NTC] Jones, Walker, Waechter, Poitevent, Carrere & Denegre Place St. Charles 201 St. Charles Avenue 50th Floor New Orleans, LA 70170 22071 504-582-8272 Michele Whitesell Crosby 504-231-2092 [COR] Jones, Walker, Waechter, Poitevent, Carrere & Denegre Four United Plaza 8555 United Plaza Blvd. 5th Floor Baton Rouge, LA 70809-7000 22033 504-231-2000 FTS 231-2010

Proceedings include all events APPEAL
3:85CV146 Faulkenberry v. Elkins, et al Closed Lead

__/19/85 - This is a skelton docket sheet consisting only of pleadings that were filed after the case closed. (hj) [Entry date 12/14/95]

1/2/86 - Case closed (hj) [Entry date 12/14/95]

11/21/95 10 MOTION by CH Faulkenberry Jr for substitution of party plaintiff by the purpose of a motion to receive the judgment. (hj) [Entry date 12/14/95]

11/21/95 11 MOTION by CH Faulkenberry Jr to revive judgment (hj) [Entry date 12/14/95]

11/27/95 12 ORDER denying [10-1] motion for substitution of party plaintiff...(signed by Judge Frank J. Polozola), issued notices. (hj) [Entry date 12/14/95] [Entry date 12/15/95]

11/27/95 13 ORDER denying [11-1] motion to revive judgment... (signed by Judge Frank J. Polozola), issued notices. (hj) [Entry date 12/14/95] [12/15/95]

12/14/95 14 MOTION to substitute David L. Smith as party and for Microbe Master, Inc. and International Biochemicals Group to Show Cause why a Writ of Execution/Fieri Facias should not issue (hj) [Entry date 12/15/95]

12/19/95 15 ORDER denying [14-1] motion to substitute David L. Smith as party plaintiff and show cause (signed by Judge Frank J. Polozola), issued notices (hj)

12/27/95 16 NOTICE OF APPEAL by David L. Smith...on order denying Motion to substitute plaintiff. Appeal record due on 1/26/96 (hj) [Entry date 01/03/96]

Proceedings include all events APPEAL
3:85CV146 Faulkenberry v. Elkins, et al Closed Lead

1/11/96	17	LETTER to Mr. David L. Smith from Richard T. Martin, Clerk RE: Writ of execution (hj) [Entry date 01/12/96]
1/18/96	-	Notice of Appeal and certified copy of docket to USCA: [16-1] appeal by David L. Smith (hj)
1/22/96	18	ORDER...CA 95-2041 is hereby consolidated with CA 85-146 and CA 95-2041 is transferred from Section A to Section B (signed by Judge Frank J. Polozola), issued notices. (hj)
1/22/96	-	Consolidated Lead Case (hj) [Entry date 02/06/96]
1/31/96	-	Notice of Appeal and certified copy of docket to USCA: [16-1] appeal by David L. Smith (hj)
2/5/96	-	SUMMONS(ES) issued for international Group. Service deadline set for 2/19/96. Consent Notices Mailed. (hj) [Entry date 02/06/96]
2/6/96	19	LETTER to Clerk from David Smith RE: Change of Address. (hj) [Entry date 02/07/96)
2/8/96	20	LETTER to Clerk from Charles Watts RE: A partial cancellation of judgment and judicial mortgage (copies attached) (hj) [Entry date 02/09/96]
2/8/96	-	USCA Case Number Re: [16-1] appeal by David L. Smith USCA NUMBER: 96-30089 (hj) [Entry date 02/09/96]
2/13/96	21	MOTION by David L. Smith to appeal order rendered 12/13/95 denying motion to substitute and rule to show cause (hj)
2/22/96	-	USCA appeal fees received FILING FEE $ 105.00 RECEIPT # 58532 (hj) [Entry date 02/23/96]

Proceedings include all events APPEAL
3:85CV146 Faulkenberry v. Elkins, et al Closed Lead

3/22/96	22	ANSWER to Complaint by International Croup (Attorney Alton E. Bayard III, Michele Whitesell Crosby), (sh)
3/28/96	-	Certified and transmitted Record on Appeal to U.S. Court of Appeals: [16-1] appeal by David L. Smith (hj)
4/1/96	23	STATUS REPORT by David L. Smith (hj) [Entry date 04/02/96]
4/3/96	-	USCA Case Number Re: [16-1] appeal by David L. Smith USCA NUMBER: 96-30089 (hj) [Entry date 04/04/96]

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DAVID L. SMITH
VERSUS
INTERNATIONAL
BIOCHEMICALS GROUP, INC.

CIVIL ACTION
NO. 95-2041
SECTION A-1

PETITION TO REVIVE JUDGMENT

The petition of David L. Smith, a resident of East Baton Rouge Parish, Louisiana respectfully represents:

I.

This is a petition for revival against the successor corporation to the original judgment debtor corporation **Microbe Masters, Inc.** of a judgment granted by this court January 3, 1986 in Civil Action 85-146 "C. H. Faulkenberry, Jr. versus Elkins, Benefits Systems, Inc., Microbe Masters, Inc." and is a matter ancillary to the original action and independent grounds of jurisdiction are not required.

II.

Defendant **International Biochemicals Group, Inc.** is a for profit corporation organized under the laws of the State of Deleware but is authorized to transact business in Louisiana and maintains corporate offices at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 and has appointed

Gary Legendre at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 as its registered agent in Louisiana.

III.

Defendant **International Biochemicals Group, Inc.** was formerly known as **Environmental Remediation, Inc.** having amended its Articles of Incorporation on June 23, 1994. **Environmental Remediation, Inc.** was formerly known as **Innovative Ventures Group, Inc.** was incorporated in accordance with the laws of the State of Deleware on December 3, 1991.

IV.

At 11:59 P.M. on June 30, 1992, defendant **International Biochemicals Group, Inc., f/k/a Environmental Remediation, Inc. f/k/a Innovative Ventures Group, Inc.,** pursuant to terms of merger contained in a **CERTIFICATE OF OWNERSHIP AND MERGER** between and among Environmental Solutions, Inc., Environmental Solutions Industries, Inc. ERI Environmental Services, Inc. Environmental Remediation Field Services, Inc., ERI Environmental Services of California, Inc., **Environmental Remediation, Inc.** and **Innovative Ventures Group, Inc.** dated June 5, 1992, assumed all of the liabilities of its sole shareholder/parent corporation **Environmental Remediation, Inc.,** a Deleware corporation.

V.

This prior corporation bearing the name **Environmental Remediation, Inc.** is believed to be the **Environmen-**

tal Remediation, Inc. identified in an act of **TRANSFER OF ASSETS OF MICROBE MASTERS, INC. IN LIQUIDATION** dated January-30, 1991 as the sole shareholder of **Microbe Masters, Inc.** In this act of transfer in liquidation J. Peter Perez, as Liquidator of **Microbe Masters, Inc.**, conveyed all the property of **Microbe Masters, Inc.** to **Environmental Remediation, Inc.**, it sole shareholder and J. Peter Perez, as President of **Environment Remediation, Inc.**, sole shareholder of **Microbe Masters, Inc.**, in the same act of transfer in liquidation accepted the transfer of all the assets of **Microbe Masters, Inc.** and assumed liability for any and all debts or liabilities of **Microbe Masters, Inc.** of whatever description. And, thus, petitioner has reason to believe that defendant **International Biochemicals Group, Inc.** is the le al successor to **Microbe Masters, Inc.** and has assumed the obligation to pay all liabilities of **Microbe Masters, Inc.**, a Louisiana corporation.

VI.

One of those liabilities was that created by a judgment on the 3rd of January, 1986, in the matter entitled "D. H. Faulkenberry, Jr. versus John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.", Civil Action No. 85-146 in the United States District Court, Middle District of Louisiana, rendered in favor of plaintiff C. H. Faulkenberry, Jr. and against defendants John Elkins, Benefits Systems, Inc., and **Microbe Masters, Inc.** in the amount of THIRTY THOUSAND AND NO/100 ($30,000.00) DOLLARS in settlement of his Keogh account with legal interest until paid. This judgment has been recorded in the mortgage records of East Baton Rouge Parish, State of Louisiana on April 30, 1987 at Original 440 Bundle 9918.

VII.

Claude Hiram Faulkenberry, Jr. (plaintiff C. H. Faulkenberry, Jr. in Civil Action No. 85-146) died on July 5, 1992 in Concordia Parish, Louisiana. A **STATUTORY WILL** executed on March 16, 1992 at Vidalia, Louiaiana by Claude Hiram Faulkenberry, Jr. was submitted for probate in "Succession of Claude Hiram Faulkenberry, Jr.", Probate No. 31230A, 7th Judicial District Court of the State of Louisiana, Parish of Concordia. The **STATUTORY WILL** of Claude Hiram Faulkenberry, Jr. named his widow Fern Lea Faulkenberry sole heir. **By. JUDGMENT OF POSSESSION** rendered September 8, 1992 in Probate No. 31230A, Fern Lea Arnold Faulkenberry was recognized and decreed to be the sole Universal Legatee of the entire estate of the decedent Claude Hiram Faulkenberry, Jr., and as such the owner, and she was sent into possession, without benefit of inventory of all the property of the succession of the decedent Claude Hiram Faulkenberry, Jr.

VII.

By act of **ASSIGNMENT OF JUDGMENT** dated October 26, 1993 Fern Faulkenberry assigned all of her interest in the judgment rendered in favor of C. H. Faulkenberry, Jr. in Civil Action 85-146, U.S. District Court, Middle District of Louisiana on January 3, 1986 to petitioner and at all times thereafter petitioner has been the owner of the interest of C. H. Faulkenberry, Jr. in the judgment in favor of C. H. Faulkenberry, Jr. and against John Elkins, Benefit Systems, Inc., and **Mircobe Masters, Inc.** in Civil Action 85-146. This act of **ASSIGNMANT OF JUDGMENT** has been recorded in the mortgage records of East Baton Rouge Parish, State of Louisiana on October 27, 1993 at Original 561 Bundle 10450.

IX.

Petitioner has reason to believe that defendant **International Biochemicals Group, Inc.** is an obligor of the judgment rendered in favor of C. H. Faulkenberry, Jr. in Civil Action 85-146. Petitioner is the current owner of, and successor to, the interest of C. H. Faulkenberry, Jr. in the judgment rendered in Civil Action 85-146. Nothing has been paid on this judgment, the full amount of it is still due and the statute of limitations is about to run on the enforcement of the judgment and petitioner seeks to revive it for the maximum extended period permitted by law against **International Biochemicals Group, Inc.**, as successor to original judgment against the original judgment debtors John Elkins, Benefit Systems, Inc., and **Microbe Masters, Inc.** in the original action.

X.

Petitioner, as successor of the interest of C.H. Faulkenberry, Jr., is entitled to have this judgment revived before it prescribes.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DAVID L. SMITH	CIVIL ACTION
VERSUS	NO. 95-2041
INTERNATIONAL BIOCHEMICALS GROUP, INC.	SECTION A-1

VERIFICATION

Personally come and appeared before me, the undersigned Notary Public, David L. Smith, Who being duly sworn, deposed and said that he is the petitioner in the foregoing petition and that all of the allegations of fact therein contained are true and correct except where made on information and belief which he believes to be true and correct to the best of his knowledge, information and belief.

s/David L. Smith
DAVID L. SMITH
2834 S. Sherwood Forest,
Suite D8
Baton Rouge, Louisiana 70816
504/291-8003

SWORN TO AND SUBSCRIBED BEFORE ME, Notary Public, this 28th day of December, 1995 in Baton Rouge, Louisiana.

s/Judy Stewart Patterson
NOTARY PUBLIC

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DAVID L. SMITH	CIVIL ACTION
VERSUS	NO. 95-2041
INTERNATIONAL BIOCHEMICALS GROUP, INC.	SECTION A-1

ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S PETITION TO REVIVE JUDGMENT

International Biochemicals Group, Inc. ("International Biochemicals") responds to the Petition to Revive Judgment ("petition") filed on December 28, 1995, by David L. Smith ("Smith") as follows.

First Defense

Smith fails to state a claim upon which relief can be granted.

Second Defense

Through Microbe Masters, Inc., was identified in the action, International Biochemicals avers that Microbe Masters, Inc. was not a party to Civil Action No. 85-146 "*C. H. Faulkenberry, Jr. v. John Elkins, Benefits System, Inc., Microbe Masters, Inc.,*" was not served in the suit, and was a stranger to the proceeding. International Biochemicals further avers that the court record containing pleadings from 1985 and 1986 was unavailable for review.

Third Defense

The judgment rendered in Civil Action No. 85-146 "*C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.,*" is a nullity as to Microbe Masters, Inc.

Fourth Defense

Alternatively, to the extent that the judgment is not a nullity, the judgment was satisfied as to Microbe Masters, Inc. by the partial cancellation of judgment and judicial mortgage filed and recorded in East Baton Rouge Parish as original 603, bundle 10012.

AND NOW, International Biochemicals responds to the individual paragraphs of the petition, as follows:

5.

International Biochemicals admits that it is the successor corporation to Microbe Masters, Inc., specifically denies that Microbe Masters, Inc. was an original judgment debtor of a judgment granted by the United States District Court, Middle District of Louisiana, on January 3, 1986, in Civil Action No. 85-146 "*C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.*" and denies all other allegations in paragraph one of the petition.

6.

International Biochemicals admits it is a foreign corporation organized under laws of Deleware and authorized to do and doing business in the State of Louisiana, it main-

tains corporate offices at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 and has appointed Gary Legendre at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 as its registered agent for service of process.

7.

International Biochemicals admits the allegations in paragraph three of the petition.

8.

International Biochemicals admits the allegations in paragraph four of the petition.

9.

International Biochemicals admits the allegations in paragraph five of the petition except it denied Smith's belief.

10.

International Biochemicals admits that a judgment was rendered in "*C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.,*" Civil Action No. 85-146, in the United States District Court for the Middle District of Louisiana in favor of plaintiff, C.H. Faulkenberry, Jr. in the amount of $30,000 with legal interest until paid; that the judgment was recorded in the mortgage records of the East Baton Rouge Parish, State of Louisiana, on April 30, 1987, an original 440 bundle 9918; denies that it assumed any obligation created by that judgment and denies the remaining allegations contained in paragraph six of the petition.

International Biochemicals denies the allegations in paragraph seven for lack of sufficient information to justify a belief.

12.

International Biochemicals denies the allegations in paragraph eight for lack of sufficient information to justify a belief.

13.

International Biochemicals denies that it is an obligor of the judgment rendered in favor of C.H. Faulkenberry, Jr. in Civil Action No. 85-146: admits that petitioner filed a motion for revival of the judgment in Civil Action No. 85-146; and denies the remaining allegations in paragraph nine.

14.

International Biochemicals denies the allegations in paragraph ten.

WHEREFORE, defendant, International Biochemicals Group, Inc., prays that this answer be deemed good and sufficient and that after proceedings are had, the Court render judgment in favor of International Biochemicals and against David L. Smith dismissing this action with prejudice, and awarding it all costs expenses to which may be entitled, and awarding it all legal, equitable, general, and other relief to which it may be entitled.

Respectfully submitted,

s/Alton E. Bayard, III

Alton E. Bayard, III (Bar No. 2868)
Michele Whitesell Crosby
(Bar No. 20152)
Jones, Walker, Waechter, Poitevent, Carrére & Denégre, L.L.P.
One American Place, Suite 1700
Baton Rouge, Louisiana 70825
Telephone: (504) 377-8900

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been served upon all known counsel of record by placing a copy of same in the U.S. Mail, postage prepaid, and properly addressed this 22nd day of March, 1996.

s/ Alton E. Bayard, III

Alton E. Bayard, III